Stormor, Inc. Division of Fuqua Industries, Inc. *and* United Steelworkers of America, and its Local No. 7377, AFL-CIO, CLC. Case 17-CA-10621

10 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 September 1982, Administrative Law Judge Gordon J. Myatt issued the attached decision. The Charging Party filed exceptions and a supporting brief, and Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] Chairman Dotson and Member Hunter find it unnecessary to pass on or apply the presumptions concerning strike replacements set out in *Pennco, Inc.*, 250 NLRB 716 (1980), and like cases, because on the facts here they find that under any view of the law the Respondent did not violate the Act by withdrawing recognition from the Union.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon the charge filed by United Steelworkers of America, and its Local No. 7377, AFL-CIO, CLC (the Union) on September 28, 1981,[1] against Stormor, Inc., a Division of Fuqua Industries, Inc. (the Respondent), the Regional Director for Region 17 issued a complaint and notice of hearing on March 11, 1982. The complaint alleges that the Union was certified as the exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit on June 28, 1967, and that the parties have been subject to successive collective-bargaining agreements; the most recent of which was effective from February 12, 1978, until February 11, 1981. Further, that since September 11, 1981, and at all times thereafter, the Respondent has withdrawn recognition of and has refused to bargain with the Union as the exclusive representative of the Union. The complaint alleges that by this conduct the Respondent has violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. (the Act).[2] The Respondent filed an answer admitting certain allegations of the complaint, denying others, and specifically denying the commission of any unfair labor practices. The Respondent's answer also asserts an affirmative defense in that it asserts a good-faith doubt regarding the Union's majority status as the bargaining representative of the unit employees.

A hearing was held on this matter in Fremont, Nebraska, on May 11 and 12, 1982, at which all parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present relevant and material evidence of the issues involved herein. Briefs were submitted by all counsel and have been duly considered.

Upon the entire record in this case,[3] including my observation of the witnesses and their demeanor while testifying, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the manufacture of grain storage buildings, drying equipment, and metal buildings at various facilities including a facility located in Fremont, Nebraska. In the course and conduct of its business operations within the State of Nebraska, the Respondent annually purchases goods and services in excess of $50,000 directly from sources located outside the State of Nebraska. In addition, from its Fremont facility the Respondent annually sells goods and services valued in excess of $50,000 directly to customers located outside the State of Nebraska. On the basis of the foregoing, I find that the Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Steelworkers of America, and its Local No. 7377, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

The Union was certified by the Board in 1967 as the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit:

> All production and maintenance employees employed at the [Fremont] facility but excluding office clerical employees, guards and supervisors as defined in the Act.

[1] All dates herein refer to the year 1981.

[2] During the course of the hearing, the General Counsel was permitted to amend the complaint to allege a separate violation of Sec. 8(a)(1) of the Act involving an alleged unlawful interrogation of a unit employee.

[3] The official transcript contains numerous errors which are hereby corrected in the manner set forth in "Appendix A" attached to this Decision. [Appendix A omitted from publication.]

Since the certification, the Union and the Respondent have been parties to successive collective-bargaining agreements and the last agreement between them was effective February 12, 1978, to February 11, 1981.

B. *The Efforts to Negotiate a New Agreement*

Prior to the expiration of the last contract, the parties began negotiations for a new agreement. These negotiations began on January 8, 1981, and were finally terminated on June 22. During this period there were approximately 17 bargaining sessions, but the parties failed to arrive at an agreement.[4]

Approximately a week or so after the expiration date of the then existing agreement, but while negotiations were continuing, the Respondent locked out the unit employees. This was part of a bargaining stratagem employed by the Respondent to exert pressure on the Union to come to terms on a new agreement. The testimony indicates that the Respondent's management anticipated that the employees would continue work without a new contract until the busy season began (late spring), and then engaged in a strike to compel the Respondent to accept the Union's contract proposals. In order to forestall such a maneuver, the Respondent decided to lock out the unit employees in mid-February.

The lockout lasted until March 25. On that date, management officials advised the representatives of the Union that the lockout would be terminated because it appeared the parties were close to arriving at an agreement. The union representatives in turn advised the Respondent's officials that they wanted to conduct a meeting of the membership before returning to work. They insisted that the return of the employees be delayed until the following Monday (March 30).

On March 29, a membership meeting was held by the Union. At the recommendation of the union leadership, the employees unanimously approved going on strike in support of their contract demands rather than returning to work as requested by the Respondent.[5]

C. *The Economic Strike and the Hiring of Permanent Replacements*

On March 30, the vast majority of the unit employees, led by Richard Hawkins, the staff representative of the Union, began picketing the Respondent's facilities. At the time of the lockout, the Respondent had 93 employees on its payroll. When the strike commenced, all of the employees, with the exception of six who returned to work the day the strike started, withheld their services from or picketed the Respondent. Several days after the strike commenced, the Respondent began hiring permanent replacements for the striking employees.

The strike activity became violent, on the picket line as well as away from the Respondent's facilities.[6] Two of the returning nonstrikers, Betty Jespersen and Wayne Radtke, testified they only worked the first 2 days after their return to the jobs and then remained at home for an extended period of time before ultimately returning to work.[7] The Respondent maintained a "strike-log" to record the various incidents when they were observed by members of management or reported to them by nonstrikers and strike replacements. For the most part, all entries in this log were made by Patrick McIntire, plant superintendent, based on his personal observations or reports made to him of incidents by supervisors or working employees. (See R. Exh. 2.)

Because of the violence and property damage, the Respondent sought and was granted a temporary restraining order against the Union and various picketers, including Hawkins, from the state district court on April 11. A permanent injunction was issued by the court on April 16. (See R. Exh. 7.) In spite of the injunction, the violent character of the strike persisted. After one flare up during the lunch hour between nonstrikers and strikers outside the Respondent's shipping department in late July, Ronald Rohrs, the Respondent's vice president for operations, warned the nonstriking employees to avoid all such incidents or suffer a loss of their jobs.

On July 28, the Respondent filed for a modification of the permanent injunction issued by the state court in an effort to further restrain picketing activity and minimize the possibility of further violence. (R. Exh. 9.) This resulted in a written agreement between the Union and the Respondent on July 31 specifying areas where pickets would be allowed to patrol, where nonstriking employees would be allowed to park their automobiles on the Respondent's property when coming to work, the routes of egress and ingress for nonstriking employees into or out of the Respondent's facilities, and rules of "non-provocative" conduct for strikers and nonstrikers alike. (See R. Exh. 10.) The testimony and documented evidence reveal that after the modification agreement was executed by the Union and the Respondent on July 31, the strike violence decreased substantially.

Approximately the same time it sought a modification of the permanent injunction in the state court, the Respondent filed charges against the Union with the Regional Office of the Board. After an investigation, the Regional Director issued a complaint alleging that the Union and its agents restrained and coerced the Respondent's employees in the course of the strike activity in violation of Section 8(b)(1)(A) of the Act.[8] (R. Exh.

[4] One of the principal issues in controversy between the parties was the amount of cost-of-living adjustment (COLA) to be included in the new agreement.

[5] Several employees who returned to work instead of striking testified they were upset with the union officials because of the manner in which the strike vote was conducted. According to them, the strike authorization was approved by a standup vote and they felt it should have been conducted by a secret ballot. However, it is undisputed that the strike was unanimously approved.

[6] It is evident from the testimony and documented evidence that the violence included physical assaults, threats of bodily harm, property damage to vehicles from rock throwing, kicks, and of the scattering of nails in the roadway, property damage at the homes of nonstrikers resulting from random gun shots, and threats over the telephone to nonstrikers and members of their families.

[7] Jespersen remained away from the plant for 3 days because of a threatening telephone call she received at home after returning to work the day the strike commenced. Radtke remained away for 3 weeks because of threatening telephone calls received by members of his family.

[8] The pertinent portion of this section of the Act provides:

Continued

8.) The Union and the Regional Director entered into a settlement agreement regarding the allegations of this complaint; however, the Respondent, as the Charging Party in this instance, refused to join in the settlement.

D. *The Sentiments Regarding the Union Expressed by Nonstrikers and Strike Replacements*

Sixteen unit employees and four management representatives were called as witnesses by the Respondent to demonstrate what it termed to be "representative testimony" regarding the strike activities and the views of the employees about continued representation by the Union:

Ogden Danner—This individual has been an employee of the Respondent since 1959 and was treasurer of the Union until he abandoned the strike to return to work on April 4. Upon his return, he told Ronald Rohrs that the employees were not receiving the "full truth" or a "fair shake" from the Union. He also told Rohrs that he wished Hawkins and the strikers would get off the street and leave the employees alone.

At some unspecified date in July, Danner told William Dill, a maintenance supervisor, that he wished the strikers would leave the nonstrikers alone and that the working employees were getting along fine without them. He made similar statements to McIntire and several other supervisors in the plant and informed them that he did not want "this kind of union" and "didn't like all the lawbreaking that was going on."

Finally, Danner testified that at some time in July or August he met Rohrs at a restaurant on a Sunday morning. Danner was accompanied by another nonstriking employee, Art Arnold. Danner told Rohrs that he wished Dick Hawkins and the strikers would get off the street and leave the people alone so that they could do the job. He also told Rohrs on this occasion that he was against having the strike because he felt the employees were not told the truth (by the union leadership). He indicated to Rohrs that he felt the strike was wrong because the economic conditions were such that business was slow.

Frank Conkling—This employee had worked for the Respondent since 1970. He abandoned the strike on April 3 and returned to his job. When Conkling returned, he spoke with Rohrs and expressed dissatisfaction with the way the contract negotiations were going. He told Rohrs that the union officials had not fully informed the employees about the Respondent's contract proposals. He also expressed a dissatisfaction over the manner in which the strike vote was taken during the membership meeting on March 29 and gave Rohrs a handwritten note purportedly setting down a question-and-answer conversation he had with Hawkins concerning the treatment of nonstrikers crossing the union picket line. (See R. Exh. 3.)

John Brewer—Brewer was hired on April 13 as a permanent strike replacement. Prior to working for the Respondent he had been president of a Steelworkers local and the chief steward of a Meatcutters local while working for other employers. Brewer testified that the day following the altercation between the shipping department employees and the strikers during the lunch hour in late July, he told Rohrs that the leadership of the Union was "unconscionable and irresponsible." Brewer also stated he did not want to have anything to do with this particular union.

Todd Vie—A strike replacement hired on April 7, Vie testified he told management, shortly after he started to work, that the lights on his automobile were knocked out while it was parked at his home. Vie stated he spoke to Rohrs at the plant on several occasions and said that he could speak for everyone in the shipping department. He told Rohrs that they did not want the Union in the plant. Vie also questioned his supervisors, Voss and Jessen, as to why the strikers were harassing the nonstrikers since they (the strikers) "had a chance to come back to work."

Stephen Kuddes—Hired in 1977, Kuddes returned to work on March 30 when the strike began. He is a leadman in the service department. Approximately a month after he returned, Kuddes told Rohrs he had been asked by "about 15 employees" whether they could have a vote to determine if the employees wanted to keep the Union as their bargaining representative. When Kuddes put the question to Rohrs, he was informed there was nothing that could be done about it.

Wayne Radtke—An employee prior to the strike, Radtke returned to work on March 30.[9] He worked for several days but returned home for a 3-week interval because members of his family had received threatening phone calls. Radtke testified that after he finally returned to work he spoke with various supervisors on a number of occasions and indicated he was tired of the harassment by strikers when he came to and from the plant. Radtke stated he told Plant Superintendent McIntire and Supervisors Braesch and Burhman that he talked with other employees, "And none of them wanted the Union in the plant."

Clifford Hood—Hood had been an employee of the Respondent since 1968 and returned to work on the day the strike started. Hood stated he returned to work after the lockout ended because he was hurting financially and had to refinance his house trailer in order to avoid losing it. He further testified that he informed McIntire on the first day he returned to work that he "didn't want no part of no union no more." Hood also spoke to Ron and Ken Rohrs that same day—the latter is the president of the Respondent. He told both Rohrs that "we did not want no more union."[10]

Darryl Beiermann—A strike replacement, Beiermann was hired in April and worked in the shipping department. This employee testified that when he first crossed the picket lines to apply for a job the striking employees warned him "that bad things happen to people who

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of rights guaranteed in section 7 . . . .

[9] Radtke stated that he returned to work for financial reasons after the lockout ended.

[10] Hood had previously been a member of the Union on two different occasions. Since Nebraska is a right-to-work state, membership in the Union could not be compelled as a condition of employment through a union-security clause.

worked for Stormor." On July 7 shots were fired at Beiermann's residence and his automobiles in the early hours of the morning. Two days later, when Beiermann went to work, he confronted Hawkins on the picket line about the shooting. An argument ensued and Beiermann struck Hawkins.[11] Beiermann testified he told his supervisors, Voss and Jessen, on several occasions that the nonstriking employees were tired of seeing the strikers on the street and that nonstrikers "were not interested in their union."

Erick Johnson—Johnson was hired as a strike replacement on April 18. He testified that he was constantly harassed by the picketing employees when he had to back up a trailer in the yard at the shipping department. Johnson also stated that he frequently expressed the view to Voss and Jessen, his supervisors, that he wished the Union would not come back into the plant.

Betty Jespersen—A long-time employee, Jespersen returned to work the day the strike commenced. Jespersen was a divorcee and stated she had to return to support herself and her daughter. Jespersen worked 2 days and then because of telephone threats and the fact that the window of her automobile was shot out, Jespersen remained away from work 3 days before ultimately returning to her job at the plant. Jespersen testified that during the course of the strike she had conversations with virtually all of the supervisors in the plant. She informed them that everybody she had talked to in the plant did not want the Union.

Carolyn Wirka—Also a long-time employee, Wirka returned to work a week after the strike commenced. As in the case of most of the returning employees, Wirka returned for financial reasons. She testified she talked with McIntire on at least three occasions about the Union. According to Wirka, she told McIntire "the general run of the people that [she] talked to in the plant, no longer said they wanted a union here." She also repeated these statements to other supervisors in the plant, including Maintenance Supervisor Dill. After an incident at her home in late April (presumably involving strikers), Wirka called Ron Rohrs on the telephone and told him that she did not think the employees should have a union.

Ernest Schroeder—Schroeder was one of the employees who returned to work during the strike (April 6). On the first day that he returned, Schroeder told Supervisor Buhrman that he felt the Union was doing the wrong thing. He repeated similar statements to other supervisors in the plant during the course of the strike.

Terry Nelson—Nelson was hired on April 3 as a strike replacement and worked as a forklift operator. As such, his job carried him throughout the plant. Nelson testified that in performing his job he had frequent conversations with other employees about the Union. Moreover, the Union was generally a topic of discussion between employees in the breakroom. He stated that sometime in May he spoke with Ron Rohrs because a number of employees had held a meeting in the breakroom during which they expressed concern about their jobs. Nelson told Rohrs that if the Union returned, he would not join it, and indicated that a number of other employees shared this view. In June, Nelson told Supervisor Buhrman that if the Union came back to Stormor, he would not join it.

Nelson further testified that picketing employees frequently made threats to him and to his girl friend when she drove him to work each day. He was also involved in an altercation with picketing employees in late July when he and other working employees were returning to the plant during the lunch hour.[12]

Franklyn Way—Way was hired as a strike replacement in the building department on April 6. He rode a motorcycle to work and stated that he had experienced two flat tires as a result of nails scattered in the roadway by strikers. He also testified that several weeks after he was hired, two striking employees followed him to a gas station after work. According to Way, they threatened to kill him for crossing the picket line. Way further testified that he had been hit by a beer bottle while working in one of the lots adjacent to the Respondent's plant. He stated that the bottle had been thrown by a picketing employee. Finally, Way testified that he told McIntire and Supervisors Buse and Poppe on several occasions during the spring and early summer that he did not want to have anything to do with having the Union around and having them where he was working.

Dale Ringle—Ringle has been employed by the Respondent since 1961. He abandoned the strike 2 weeks after it started and returned to work. Ringle testified that during the latter part of April he had a conversation with his supervisor, Gary Buse. During the conversation Buse asked what he thought about the Union.[13] Ringle, who had never been a member of the Union, replied, "I never did need a union and I don't need a union now."

Michael Olsen—As a strike replacement, Olsen worked under the supervision of Buse. He testified that during April and May he had several conversations with Buse in which the Union was the topic of discussion. Olsen stated he told Buse, "I don't know why the strikers had to be there and carry on the way they were, with all the harassment and threats and stuff."

Several management witnesses testified regarding statements made to them by nonstriking employees reflecting their antipathy toward the Union. Braesch, the floor supervisor, recalled that employee Art Arnold stated in July or August that he did not want any part of the Union. According to Braesch, Arnold mentioned this on several different occasions. Similarly, employee Bob Benson[14] told Braesch he wished the Union would go away. Plant Superintendent McIntire and Maintenance Supervisor Dill testified having a like conversation with Jespersen, Benson, Wirka, Danner, and Conkling.

[11] Beiermann was arrested by a police officer on the scene and charged with assault.

[12] This was the altercation which caused Rohrs to meet with the working employees and instruct them to avoid all incidents with the strikers or be fired.

[13] On the basis of this testimony by Ringle, the counsel for the General Counsel moved to amend the complaint to allege unlawful interrogation in violation of Sec. 8(a)(1) of the Act. The Respondent opposed this amendment claiming surprise and asserting that Buse was no longer available. Because Ringle was the Respondent's witness, the motion to amend was granted.

[14] Benson had been employed by the Respondent since 1961.

Ronald Rohrs testified he had numerous conversations with nonstriking employees in which they expressed strong feelings against the Union. Rohrs confirmed that he met Danner in August outside a restaurant and the employee said he did not want the Union back in the plant. He also stated that employee Arnold was with him at the time and expressed the same view. Rohr testified that Arnold also voiced strong resentment against Hawkins, the staff representative of the Union. In a like vein, Rohrs testified that employee Randy Strimple told him in early September that he (Strimple) would never join the Union, especially if Hawkins was a part of it.

Rohrs further testified that employee Al Barton spoke to him in late August or early September. According to Rohrs, the employee said he did not want the Union back, and if some of these strikers were rehired, they should be fearful about returning to work. Rohrs also confirmed that employee Terry Nelson stated that he would not join the Union and most of the employees he talked with in the plant were of a similar mind. Contrary to the testimony of Nelson, however, Rohrs stated this conversation took place in early September.

Rohrs also testified that in late August or early September employees Steven Hanson and Todd Vie told him they did not want to be a part of the Union. During this same period, according to Rohrs, employee Conkling came to him and stated he had heard there was a chance the striking employees would be returning to work. Conkling told Rohrs he did not want the Union or Hawkins and his "hoodlums" in the plant.

Rohrs confirmed that he had a conversation with employee Brewer after the altercation between the strikers and nonstrikers during the lunch hour in the latter part of July. He stated that Brewer said he had been active in unions at other places, but that he did not want to have anything to do with this particular union. Brewer told Rohrs that the Union was mismanaged by its leadership.

Finally, Rohrs testified that Wirka called him at the time of the disturbance at her home which she attributed to the strikers. According to Rohrs, this incident took place in July or August, and the employee said she did not want any part of the Union.[15]

In contrast to the testimony regarding the antiunion sentiments of the nonstriking employees, several striking employees and the union representative testified that nonstriking employees had expressed support for the Union to them while continuing to cross the picket line. Hawkins testified that a strike replacement named Nelson (someone other than Terry Nelson) asked to meet him away from the plant in early April. According to Hawkins, Nelson said he had to work because he needed the money but he supported the Union. Hawkins stated they met on three or four occasions and that Nelson expressed the hope that things would be settled so that everyone could enjoy the wages and benefits negotiated by the Union.

Hawkins also stated he talked with employee Beiermann on the picket line and the nonstriking employee expressed support for the Union even though he continued working. Hawkins stated that Beiermann reiterated these sentiments even after the employee assaulted him on the picket line over the matter of the shooting of his residence and automobiles. Similarly, Hawkins stated nonstriking employee Franklyn Way told him that he supported the Union. Hawkins asserted the employee made this statement in spite of the fact that Way had threatened to kill him.

Finally, Hawkins testified that when employee Danner was relieved of his position as treasurer of the Union because he abandoned the strike and returned to work, the employee asked to be allowed to attend future union meetings. Hawkins further stated that Danner said he realized the "good" the Union accomplished for him and he hoped it would continue to negotiate for the employees.

Striking employee Christensen testified that he was riding his motorcycle in a local shopping plaza on July 9 when he was cut off by an automobile. Nonstriking employees Terry Nelson and Joe Redwing got out of the vehicle and Redwing made threatening moves toward Christensen with an axe handle. According to the testimony of Christensen, Nelson then engaged him in a conversation about the work at Stormor. Christensen stated that Nelson said that he was working for the Respondent because of the good wages and benefits.[16] The confrontation was broken up after a bystander called the police.

E. *The Withdrawal of Recognition of the Union*

On September 9, Supervisor Glenn Poppe reported to Rohrs that his wife had parked their automobile in a public parking lot and when she returned, it had been spray painted with profanities. Among the profanities was the expression, "Stormor sucks." Both of the Rohrs became incensed over this act of vandalism and sought advice from their attorney. At the request of their counsel, a list of unit employees on the Respondent's payroll as of the time of the lockout was compiled. This revealed a unit of 93 employees (see R. Exh. 11). Another list of the unit employees on the payroll as of September 11 was compiled. (See R. Exh. 12.) This latter document disclosed that 86 employees were currently working in the unit. Of this number, 24 were employees who either never supported or had abandoned the strike and returned to work. The remaining 62 nonstriking employees were permanent replacements hired after the inception of the strike.

At this point, the Respondent's manager considered and rejected the idea of a petition for an election to determine whether the Union continued to represent a majority of the employees. According to Rohrs, top management decided that if an election were held in the plant, strikers and nonstrikers would be eligible to vote. Due to the past and current hostility between these two groups, management feared an election would serve "only to intensify the problems" experienced throughout the strike and "raise the feelings and anxieties" of the employees. Therefore, a decision was made to withdraw

[15] The Respondent's strike log in evidence indicates this incident occurred during the latter part of April.

[16] This incident was witnessed by striking employee Jeanne Case. According to Case, Nelson said he was happy with the money and the benefits of the job at Stormor. He also stated if the strikers did not want their jobs, they should walk away and let the nonstrikers get more benefits.

recognition of the Union on the ground that it no longer represented a majority of the unit employees.[17]

By means of a letter dated September 11, the Respondent's attorney notified the Union that the number of permanent replacements and nonstriking employees far exceeded the number of employees on strike. He further stated that the Respondent's information was that the nonstriking employees had no interest in being represented by the Union. The latter concluded with the following:

> Accordingly, under the present law of this Circuit, it is evident that you do not represent a majority of the employees and the Company must withdraw recognition of your Union. [See G.C. Exh. 1A.]

On September 17, the union representative sent a letter to the Respondent stating the Union had "altered" its negotiation proposals and requesting a meeting to resolve their differences and end the strike. (G.C. Exh. 1A.) This offer was rejected by the Respondent on September 22 on the ground that the Union no longer represented a majority of the employees. (G.C. Exh. 1A.) By a mailgram dated September 30, the Union informed the Respondent that the striking employees voted on "September 9"[18] to accept the Respondent's last contract proposal of June 22. In this mailgram the Union made an offer on behalf of the striking employees to return to work on "October 5 or sooner." (G.C. Exh. 4.) The Respondent replied on October 2 stating there were no present openings but eligible employees would be reinstated, upon appropriate request, when openings occurred. In this letter, the Respondent reiterated its position that it no longer recognized the Union as the bargaining representative of the unit employees. (See G.C. Exh. 5.)

Concluding Findings

All parties concede the strike here was an economic strike in support of the Union's bargaining demands. The General Counsel and the Union contend the Respondent unlawfully refused to bargain in violation of Section 8(a)(5) of the Act when it withdrew recognition of the Union as the bargaining representative on September 11, 1981. This argument is founded on two well-settled presumptions in Board law: (1) that after the expiration of the initial certification year, absent unusual circumstances, there is a rebuttable presumption that an incumbent union continues to maintain its majority status;[19] and (2) absent evidence to the contrary, new employees, including striker replacements, are presumed to support the union in the same ratio as those they have replaced.[20] The General Counsel and the Union contend the Respondent has not rebutted these presumptions by failing to establish that the Union in fact lost its majority status, or demonstrate that it had a good-faith doubt of the Union's continued majority status, grounded on objective considerations.

The Respondent, on the other hand, argues that this case is controlled by the holding of the United States Court of Appeals for the Eighth Circuit (in whose jurisdiction this case arose) in *National Car Rental Systems v. NLRB*, 594 F.2d 1203 (8th Cir. 1979). There, the court rejected the Board's general rule that strike replacements are presumed to support the union in the same ratio as the employees they have replaced. Instead, the court held that in a strike situation, where strike replacements cross a picket line, they are "assumed" *not* to support the union whose picket line they cross.[21] In addition to its reliance on *National Car Rental*, the Respondent asserts that it has presented evidence, based on objective considerations, sufficient to rebut the Board's presumption and to establish a good-faith doubt of the Union's continued majority status.

Addressing the Respondent's first contention that *National Car Rental* controls the decision in this case, suffice it to say that with all due respect to the court, it is not within the purview of an administrative law judge to speculate as to what course the Board will follow where a circuit court has disagreed with its views.[22] There is no evidence that the Board has abandoned its position on the general rule regarding the presumption on the sentiments of new hires, including strike replacements. Indeed, in two cases issued by the Board since its order in *National Car Rental* was denied enforcement by the Eighth Circuit, its adherence to the general rule was clearly articulated. *Pennco, Inc.*, supra at 717 and *Burlington Homes*, 246 NLRB 1029, 1031 (1979). Thus, it is apparent that the Board has not adopted the court's holding in *National Car Rental* and I must follow established Board precedent until it has been reversed, either by the Board or the Supreme Court.

Turning to the merits of the instant case, the principles to be applied are clear. In order for the Respondent to lawfully withdraw recognition of the Union, it must rebut the presumption of continued majority status in one of two ways: (1) by showing that on the date of the withdrawal of recognition the Union did not in fact enjoy majority support; or (2) by presenting evidence of sufficient objective basis to establish a reasonable doubt of the Union's majority status of the date recognition was withdrawn. In addition, the corollary presumption

[17] At the time of this decision, the Respondent calculated there were 60 employees on strike. This number was arrived at in the following manner:

Unit employees as of the date of the strike—93
Less—33 employees:
Returning employees—24
Employees discharged for strike misconduct—6
Employees who quit—3
Balance—60 employees.

[18] Although the mailgram cited "September 9" as the date the employees voted to accepted the Respondent's contract terms, the testimony indicates this was an error in transmission by Western Union and the actual date of the meeting was September 29.

[19] *J. Ray McDermott & Co.*, 227 NLRB 1347 (1977), enfd. 571 F.2d 850 (5th Cir. 1978); *Windham Community Memorial Hospital*, 230 NLRB 1070 (1977), enfd. 577 F.2d 805 (2d Cir. 1978); *Frick Co.*, 175 NLRB 233 (1969), enfd. 423 F.2d 1327 (3d Cir. 1970).

[20] *Pennco, Inc.*, 250 NLRB 716 (1980); *Windham Community Hospital*, supra.

[21] Although this holding was subsequently adopted by the Court of Appeals for the First Circuit in *Soule Glass Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), research fails to disclose its adoption by other circuit courts of appeals.

[22] *Regency at the Rodeway Inn*, 255 NLRB 961 fn. 2 (1981); *Insurance Agents (Prudential Insurance Co.)*, 119 NLRB 768, 773 (1957). Cf. *Magnavox Co.*, 195 NLRB 265 (1972).

obtains, i.e., that new hires, including strike replacements, are presumed to support the Union in the same ratio as those they replace. *Pennco, Inc.*, supra; *Saloon, Inc.*, 247 NLRB 1105 (1980); *Burlington Homes*, supra.

The Respondent contends that the violence and property damage—both on the picket line and away from it—encountered by the returning employees and the strike replacements makes it highly unrealistic to presume the nonstriking employees supported or continued to support the Union. In this regard, the facts here are somewhat analogous to the facts in the *Pennco* case. There, the strike activity involved "some incidents" of violence on the picket line and a state court injunction was issued. The Board recognized that returning strikers may cross their union's picket line for several reasons which may not involve repudiation of the union; e.g., financial reasons or unwillingness to support that particular strike. Likewise, that strike replacements may cross a picket line for similar reasons which do not warrant, in and of themselves, a presumption of rejection of the union as a bargaining representative. Thus, the Board found that "the occurrence of some violence on the picket line is, at best, one factor weakening the presumption of majority status, but not alone rebutting it." *Pennco, Inc.*, supra, fn. 16 at 718.

In the instant case, however, the record evidence discloses there was far more than an occasional occurrence of violence. The strike began on March 30 and because of numerous incidents of violence, both on and away from the picket line, a temporary restraining order was issued by the state court on April 11. This restraining order became a permanent injunction on April 16. The court order did not cause the violent incidents to subside and on July 27, the Respondent sought a modification of the injunction to further curb the violent activity. This resulted in a modification agreement between the Union and the Respondent spelling out limitations on the picketing and placing constraints on strikers and nonstrikers alike. Thus, rather than occasional incidents of violence, the facts here indicate continued violent strike activity over an extended period—approximately 3-1/2 months. In my judgment, this significantly enhances the weight to be accorded the factor of crossing the picket line and the effect this factor has in rebutting the presumption that strike replacements support the Union in the same ratio as those they replaced.

But the crossing of the picket line under these circumstances is not the only factor to be considered here. The testimony given by the Respondent's witnesses show that a number of returning employees and strike replacements expressed sentiments directly to members of management that clearly revealed they and other nonstriking employees repudiated or rejected the Union as their bargaining representative.

Of the 16 employee witnesses presented by the Respondent, 8 returning employees[23] and 7 striker replacements[24] made statements to various supervisors and/or to Rohrs which were unqualified rejections or repudiations of the Union as their bargaining representative. In addition, several of these employee witnesses indicated to management that their rejection of the Union was a sentiment shared by other employees (Jespersen—"Everyone she spoke to in the plant did not want a union"; Kuddes—"Fifteen employees were asking if they could vote on whether to keep the Union as their representative"; Nelson—"He would not join the Union and other employees felt the same way"; Radtke—"He and other employees did not want the Union to return to the plant"; Vie—"That all the shipping department employees did not want the Union in the plant").[25] Further, the testimony of the Respondent's supervisors and management officials discloses that several other employees expressly repudiated or rejected the Union as their bargaining representative during the course of conversations with these management officials.

In assessing the statements of the nonstriking employees, I am not unmindful of the testimony presented by the union witnesses to demonstrate that the nonstrikers nevertheless expressed support for the Union to them. However, when the circumstances under which most of these statements were purported to have been made is considered, I find it difficult to attach much credence to this testimony. For example, Hawkins testified that Beiermann told him on the picket line that he hoped the Union would continue to negotiate for the employees. Yet this statement is alleged to have occurred after Beiermann committed an assault on Hawkins during a confrontion on the picket line over the shooting of his residence. Similarly, Hawkins stated nonstriker Way voiced support for the Union even though Way had threatened to kill Hawkins. The testimony relating to statements of support purportedly made by strike replacement Nelson is equally improbable. This statement is alleged to have been made after Nelson and another person, identified as Redwing, cut off striker Christensen while he was riding his motorcycle in a shopping center. Nelson and Redwing jumped out of their vehicle and threatened Christensen with an axe handle. It was then, according to the testimony of the union witnesses, that Nelson stated he enjoyed the benefits and wages he was receiving at the Respondent's plant and the strikers should walk away and let the nonstrikers continue to earn them. In these circumstances, it is extremely doubtful that Nelson was expressing support for the Union. If anything, he was goading and taunting the striking employees who were no longer at work.

In the light of the statement repudiating or rejecting the Union made by approximately 20 percent of the nonstriking employees, speaking for themselves and in some instances purporting to speak for other nonstrikers as well, the question becomes whether this factor coupled with the crossing of the picket line during the period of the strike violence effectively rebuts the presumption of continuing majority status. As the Board has cautioned, the burden of proof on the employer—while it is less

[23] The returning employees who so testified were: Danner, Conkling, Kuddes, Radtke, Hood, Jespersen, Wirka, and Ringle.

[24] The striker replacements who so testified were: Brewer, Vie, Beiermann, Johnson, Nelson, Way, and Olsen.

[25] Only the testimony of nonstriker Schroeder might be deemed as indicating disapproval of the strike and not repudiation of the Union as the bargaining representative.

than actual proof of lack of majority support—to rebut the presumption is a heavy one. *Pennco, Inc.*, supra at 717. The Board further indicated this heavy burden is due to the fact that the presumption rests on the dual Federal labor policies of (1) promoting continuity in bargaining relationships, and (2) protecting the statutory right of employees to designate a collective-bargaining representative of their own choosing, and to prevent the employer from impairing that right without some objective evidence that the representative so chosen no longer has majority support. Further, that the heavy burden of proof is all the more compelling in a strike situation, since the striking employees risk permanent replacement in exercising their statutory right to engage in an economic strike. Ibid.

Weighing the crossing of the picket line in the face of the strike violence and the statements of rejection and repudiation of support for the Union conveyed to management by a substantial number of the nonstriking employees, I am constrained to conclude that the Respondent has met the required burden of proof. The Respondent has shown that the nonstrikers continued to cross the picket line in spite of the sustained strike violence over a 3-1/2 month period. As the Board noted in *Pennco, Inc.*, this is a factor which weakens the presumption of majority support for the Union. But in addition, the Respondent has established in the record that a substantial number of the employees who crossed the picket line did not, in fact, support the Union. Since it is not necessary for the Respondent to show actual loss of majority support, the unsolicited statements of rejection and repudiation of the Union by approximately 20 percent of the nonstriking employees disclosing that they *and* other groups of nonstriking employees did not want the Union to represent them must be given considerable weight in determining whether the presumption has been rebutted. Considering both of these factors in the light of labor policies underlying the presumption, I am of the view that the Respondent has presented sufficient objective evidence on which to ground a good-faith doubt regarding the Union's majority status at the time it withdrew recognition from the Union on September 11. Accordingly, I find, in the circumstances here, that the Respondent did not violate the Act when it declined to recognize the Union as the representative of its employees.

The final issue to be addressed here is the asserted unlawful interrogation of employee Ringle when he told Supervisor Buse that he "never needed a union and didn't need it now." On cross-examination, Ringle testified he made this statement when Buse asked him what he thought about the Union. There is no indication in the testimony of Ringle as to how the conversation was initiated or under what circumstances it took place. Ringle was never a member of the Union prior to the strike and there is no indication that during the conversation Buse made any threats or promised any benefits to the employees. Since there is no evidence of any concurrent unlawful conduct by any of the Respondent's supervisors or management officials in this case, I find that no unlawful interrogation took place during this conversation between Ringle and Buse. Moreover, if such conversation could be construed as being technically unlawful interrogation, it was of such an isolated nature that it does not warrant the finding of a violation.

CONCLUSIONS OF LAW

1. Stormor, Inc. Division of Fuqua Industries, Inc. is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, and its Local No. 7377, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not engage in unlawful interrogation of an employee in violation of Section 8(a)(1) of the Act.

4. By withdrawing recognition of the Union as the collective-bargaining representative of a majority of its employees in an appropriate unit on September 11, 1981, the Respondent did not commit a violation of Section 8(a)(5) of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record in this case, I recommend the following

ORDER[26]

The complaint herein is dismissed in its entirety.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.